to this issue was approved by this office in an opinion rendered to the Industrial Commission under date of May 19, 1936, being Opinion No. 5560.

It is accordingly my opinion that these bonds constitute a valid and legal obligation of said city.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

615.

CITIES—POWER TO INSURE PUBLIC PROPERTY, PROPRIETARY FUNCTION—LIABILITY IN TORT—CONSTRUCTION AND MAINTENANCE OF PUBLIC WAYS—CONTRACTS, RECOVERY.

SYLLABUS:

1. *A city has implied power to insure its public property, and like power to enter into a contract for indemnity insurance in so far as its proprietary functions are concerned.*

2. *A city is not liable in tort to persons injured by it in the exercise of a governmental function, unless made so by statute, as in the case of the enactment of Section* 3714, *General Code. The construction and maintenance of the public ways of a city were recognized governmental functions, but when the General Assembly, by the enactment of such section imposes specific duties upon the city relative to the exercise of such governmental function, the city must perform such specific duties or render itself liable in tort.*

3. *A charter city has no authority to enter into a contract in excess of five hundred dollars without following the provisions of its city charter relative thereto which are in conformity with the general code. A contract in excess of five hundred dollars otherwise entered into, is void, and money paid thereunder can be recovered in accordance with the rules of equity recognized by the common law in cases of rescission.*

4. *Recovery cannot be had by the city where the contract has been fully executed and no effort has been made by the city to put the party to whom the money was paid into status quo.* State, ex rel, *vs.* Fronizer, et al., *77 O. S. 7.*

COLUMBUS, OHIO, May 19, 1937.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: I am in receipt of your communication of recent date as follows:

> "We are attaching hereto a letter from our Columbus Examiner in which it is shown that the City entered into a contract with The Hartford Steam Boiler Inspection and Insurance Company for liability insurance for a consideration of $778.65, which covers liability on boilers operated by various divisions of the City. The cost of such insurance was allocated, as shown by the letter, as follows:
>
> | | |
> |---|---|
> | Division of Waterworks—Pumping Station | $417.25 |
> | Public Lands and Buildings—Police Station | 123.50 |
> | Workhouse—Jackson Pike | 94.65 |
> | Engineering—Road Rollers | 143.25 |
> | Total | $778.65 |
>
> The Examiner has called attention to opinion No. 3311, found in Attorney General's Opinions for the year 1934, indicating the limitations upon the liability of boards of county commissioners, and also opinion No. 4662, found in Attorney General's Opinions for 1932, indicating that a municipal corporation, in the construction, operation and maintenance of a municipal hospital by favor of Section 4025, et seq., of the General Code of Ohio, is in the performance of a governmental function and is not liable in tort either to patients in said hospital or to third persons on account of the negligence of the municipality or its servants and agents nothwithstanding the fact that some patients pay for services which the hospital affords.
>
> In connection with the facts and opinions stated and referred to in the letter, the following questions are presented:
>
> Question 1. Is the City of Columbus liable to third parties on account of damages, either personal or property, arising as a result of the operation and maintenance of steam boilers by the several Divisions or Departments thereof?
>
> Question 2. If such liability exists at all does it arise in the performance of governmental as well as proprietary functions?

Question 3. If no such liability exists in either the performance of a governmental or proprietary function, may the City legally expend public funds for the purchase of an insurance contract such as shown herein?

Question 4. Since the total premium on this contract of insurance exceeds $500 are the provisions of Sections 4326 and 4371 of the General Code of Ohio and Section 162 of the Charter of the City of Columbus, applicable as a limitation on expenditures without specific authority of council and advertisement for bids?

Question 5. If the City of Columbus cannot legally expend public funds for the purchase of all or any part of such insurance, may findings for recovery be returned for premiums paid?

Will you kindly consider these questions and advise us at your earliest convenience?

I likewise note your enclosure to which I shall merely make reference.

Your request is rather comprehensive inasmuch as it involves a discussion of the major part of the law of torts as applied to municipal corporations. Your second question, namely, is a municipal corporation liable in tort when exercising a governmental function as well as a proprietary function, should, as a matter of logic, be the first question. The terms "governmental" and "proprietary" as applied to the functions of municipal corporations, were defined by the Supreme Court of Ohio in the case of *Wooster* vs. *Arbenz,* 116 O. S. 261, viz:

> "In performing those obligations which are imposed upon the state as obligations of sovereignty, such as protection from crime, or fires, or contagion, or preserving the peace and health of citizens and protecting their property, it is settled that the function is governmental, and if the municipality undertakes the performance of those functions, whether voluntarily or by legislative imposition, the municipality becomes an arm of sovereignty and a governmental agency and is entitled to that immunity from liability which is enjoyed by the state itself. If, on the other hand there is no obligation on the part of the municipality to perform them, but it does in fact do so for the comfort and convenience of its citizens, for which the city is directly compensated by levying assessments upon property, or where it is indirectly benefited by growth and prosperity of the city and its inhabitants, and the city has an election whether to

do or omit to do these acts, the function is private and proprietary.

Another familiar test is whether the act is for the common good of all the people of the state, or whether it relates to special corporate benefit or profit. In the former class may be mentioned the police, fire and health departments, and in the latter class, utilities to supply water, light and public markets."

It is also stated in 28 O. Jur. Sec. 601:

"It is now well established in Ohio as elsewhere, as a general rule, subject to some exceptions, that in the absence of statutory rule to the contrary, a municipality is not liable for injuries occurring in connection with matters relating to its governmental functions, but is liable for torts committed in connection with the exercise of its private or proprietary power and functions under substantially the same rules and principles which govern the liability of private corporations and individuals, except with regard to matters involving legislative or judicial discretion."

I quote further from *Wooster* vs. *Arbenz,* supra:

"This Court is for the present committed to the doctrine that there is no liability on the part of a municipality in actions for tort, if the function exercised by the municipality at the time of injury to the plaintiff was a governmental function. The non-liability for governmental functions is placed on the ground that the state is sovereign, that the sovereign can not be sued without its consent and that the municipality is the mere agent of the state and therefore can not be sued unless the state gives its consent by legislation.

Prior to 1912 the State of Ohio was entirely immune from judgments upon any ground, and although the people at that time made provision by amendment to Section 16 of the Bill of Rights, whereby suits might be brought against the state, the provision was not self-executing, and required legislation, which has never been enacted."

The above case was cited and approved in the following cases: *Hamilton* vs. *Dilley,* 120 O.S., 129; and *City of Mingo Junction* vs. *Sheline, Admx.* 130 O.S. 38. In each and both of these cases it was made plain that the General Assembly could impose liability upon a municipality, even though at the time of the injury the municipality was

exercising a governmental function. In these cases Section 3714, General Code, was involved, which provides:

> "Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, side-walks, public grounds, bridges, aqueducts and viaducts within the corporation and shall cause them to be kept open, in repair and free from nuisances."

The improvement and maintenance of streets, alleys and other public ways is the performance of a governmental function. *Dayton* vs. *Glaser,* 76 O.S. 471.

Street-cleaning comes within the classification of governmental functions. *Akron* vs. *Butler,* 106 O. S. 122.

Thus it is patent, that although the improvement and maintenance of streets and alleys is a governmental function, if the General Assembly attaches to the performance of such governmental function, a specific duty, it must be performed, else the municipality becomes liable in tort. This is doubtless upon the theory that as the state delegates to its municipalities the attribute of sovereignty, it can take it away through the General Assembly by specific requirement and that is the doctrine recognized in Ohio. To fortify this statement of the law, it is not necessary to pass beyond Section 3714, General Code, supra. Ever since its enactment it has been universally held that a failure to comply with its requirements renders the municipality liable in tort. It is stated in 28 O. Jur., Sec. 63, pages 100 and 101:

> "In the acquisition, maintenance and operation of public utilities, such as lighting, power and heating plants, and water-works, municipalities act in their private or proprietary capacity."

In the case of *Salem* vs. *Harding,* 121 O.S. 412, it was specifically held that the operation of a water-works plant was a proprietary function. In the case of *Rose* vs. *Toledo,* 1 O.C.C. (N.S.) 321 it was held that a municipality, in constructing and maintaining a prison or work-house, acts in a governmental capacity.

A police station surely comes within the category of prisons as persons are detained therein prior to trial and sentence. It necessarily follows that in the maintenance of such police station, the city is acting in a governmental capacity.

Road-rollers are an incident to the construction and maintenance of the streets and highways of the city and the maintenance of such road-rollers, although a governmental function, being an incident to the construction and maintenance of the city's public ways, nevertheless the city would be liable in tort to a person injured by reason of the negligent operation of the road rollers because it is made so by statute.

You refer to hospitals in your communication, in all probability with the thought that hospitals are analogous to the institutions contained in your questionnaire. Suffice it to say, they are not analogous. Whether a hospital, under the law, is charitable or non-charitable, determines whether or not its operation by a municipality is a governmental or proprietary function.

In my opinion, in the maintenance of the workhouse and police station referred to by you, the City of Columbus is exercising a purely governmental function and as to the operation of either of them, the City would not be liable in tort. It is my further opinion that in the maintenance and operation of its water-works and road-rollers, the City is exercising a proprietary function and is liable in tort.

Practically every case involving the governmental and proprietary functions of municipal government stands on its own bottom and it is never finally determined into which class a particular case may fall, until it is finally passed upon by a court of competent jurisdiction.

As hereinbefore indicated, a city is not liable in tort if it injures someone in the exercise of a governmental function, unless the State makes specific requirements relative thereto as in the enactment of Section 3714, General Code, supra.

Viewing this law with all possible generosity, it is more than a haze—it is a legal maze. The line of demarcation between the governmental and proprietary functions of a municipality is so faint that even the most erudite lawyers do not agree in its tracing. If lawyers agree as to its superlative complexity, should a layman be penalized for its misinterpretation?

It is my policy to accord to every man in public office, honest motives, until I am convinced he is otherwise motivated. In that light, I am constrained to believe that the City Council of the City of Columbus procured this insurance out of an abundance of caution, dictated by the uncertainty as to the City's liability and I would hesitate to recommend a finding against any of the city officials relative thereto, from the mere fact that they misinterpreted the law relative to governmental and proprietary functions.

I come now to the consideration of the question as to whether or not the contract of insurance is irregular to the extent that it is vitiated

in toto or in part. It is provided by the charter of the City of Columbus as follows:

Section 162.

> "When any expenditure in any department other than the compensation of persons employed therein exceeds five hundred dollars, it shall first be authorized and directed by council. When so authorized and directed, the proper board or officer shall make a written contract in strict accordance with the terms and conditions of the ordinance with the lowest and best bidder, after advertisement once a week for at least two weeks in the City Bulletin, and no other advertisement shall be required."

Then follows the procedure for the submission of bids; the essentials of the bids, the award and the section concludes as follows:

> "* * * All contracts shall be in writing signed by the director or head of department, and a copy thereof filed with the auditor."

This section is in step with Sections 4328 and 4371, General Code; and I do not deem it necessary to quote these sections.

This contract of insurance has been treated by the parties as an indivisible contract in so far as the consideration is concerned, and I will so treat it. The copy of the policy set out in your enclosure, I assume, is literally correct. It shows beyond cavil that the contract involved an expenditure of $778.65. I accept your statement that Section 162 of the City Charter was not followed. I do not deem it necessary to refer to Sections 4328 and 4371, for the reason hereinbefore given, that the charter section is a substantial replica of those sections. This contract is in excess of five hundred dollars and Section 162 of the charter should have been followed in the letting of this contract, but was not.

The legal steps therein set out are jurisdictional and necessarily mandatory and must be taken before a binding contract is reached between the municipality and the other contracting party. This path is so well blazed as to need little support by way of citation of authority. I am content to rely on *Hommel & Co.* vs. *Woodsfield,* 115 O. S., 675, wherein it was held that the failure to follow such statutory procedure imposed no valid obligation upon the city. This holding was approved and followed in a later opinion in the same case, 122 O.S., 148, and is the recognized law of Ohio today.

It was long ago held that persons dealing with a municipality are

charged with notice of all limitations upon the authority of the municipality or its agents, and are required at their peril to ascertain whether statutory requirements relating to the subject of the transaction have been complied with. This doctrine was first announced in the case of *McCloud* vs. *Columbus*, 54 O.S. 439, and has been strictly followed at all times by the courts of Ohio. The Supreme Court of Ohio has considered and passed on the question as to the right of a municipality to recover back moneys paid on void contracts on different occasions. In the case of *City of Cleveland* vs. *The Legal News Pub. Co.* 110 O.S. 460, the right of the City to recover unauthorized payments of money was upheld. A statutory rate for legal publication had been fixed. By an oral arrangement, it was agreed that the City should pay more than the amount fixed by statute. Action was instituted for the excess. Recovery was denied in the trial court, which judgment was affirmed by the Court of Appeals and the judgment of the Court of Appeals was reversed and the cause remanded.

The case of *Vindicator Printing Co.* vs. *State of Ohio*, 68 O.S. 362, was to like effect. Recovery being denied however, on the ground that the prosecuting attorney had no authority to institute the action.

The case that most nearly fits the question herein involved is *State, ex rel. Hunt, Prosecuting Attorney* vs. *Fronizer, et al.*, 77 O.S. 7. In such case the county commissioners entered into a contract for the building of a bridge. The bridge was constructed and it was paid for. Action was brought to recover back the money paid on the ground that the certificate of the Auditor to the effect that the money to pay for same was in the treasury to the credit of the proper fund—or had been levied and was in the process of collection—had been omitted in the legislative procedure. In short, the certificate required under the well known Burns Law, had been omitted. No claim of fraud was made in the case. The Court denied recovery on the ground that the county had the bridge and the contractors had the money, and as no effort had been made to put the contractor in status quo by a return of the bridge, the county had no right of recovery. The Court in passing on the case said: "The contracts though void, are not, under the facts admitted by the pleadings in this case, tainted." That is the case here. The contract is void but wherein is it tainted?

In this matter the contract has been fully executed. The City had whatever protection the insurance gave it and the insurance company has its premiums. There is no indication that the City has in any wise endeavored to place the insurance company in status quo—and I doubt from the nature of the transaction whether it could be done. On page 16 of the opinion, the Court said:

> "The principle applicable to the situation is the equitable one that where one has acquired possession of the property of another through an unauthorized or void contract and has paid for same, there can be no recovery back of the money without putting or showing readiness to put the other party in status quo and that rule controls the case unless such recovery is plainly authorized by statute. The rule rests upon that principle of common honesty that imposes an obligation to do justice upon all persons, natural as well as artificial, and is recognized in many cases. *Chapman* vs. *County of Douglas,* 107 U.S. 348; *Lee vs. Board of Commissioners,* 52 C.C.A. 376; *Bridge Co.* vs. *Utica,* 17 Fed. Rep. 316."

This was a succinct statement of the common law rule governing rescission. The Court further said at page 16 of this opinion:

> "It is an equally well established rule that the general assembly will not be presumed to have intended to abrogate a settled rule of the common law unless the language used in a statute clearly imports such intention."

Neither Section 162 of the Charter of the City of Columbus, nor Section 4328, General Code, nor Section 4271, General Code, uses language that would indicate a departure from the established rule of the common law. I said this contract was indivisible in so far as the consideration was concerned and I adhere to that statement, but I do find that two classes of insurance are included in the contract, namely, loss to the property of the insured, which is the City of Columbus, and indemnity insurance carried to third parties who might be injured because of the City's activities along the lines detailed in the policy. It is the part of good judgment for the City to insure its property against all possible loss. Indemnity insurance is a creature of comparatively recent birth. It is expensive, but probably not more so than other insurance when we consider the enormity of the risk. It is regarded as sound business policy for the individuals to carry reasonable indemnity insurance. Why? Because one judgment in tort might wipe out the savings of a life time. Should a city be criticized if in the matter of indemnity insurance it exercises the same prudence as the individual, when under circumstances it may be subjected to the same liability?

True, a city is not liable in tort when exercising a governmental function unless made so by statute, and it is a needless expenditure of money to insure against governmental activities, but in the exercise of

its proprietary functions, it is liable in tort to the same extent as the individual. The same axe hangs over its head and, in my opinion, it has the implied power to take out reasonable indemnity insurance for its own protection when engaged in proprietary activities.

In conclusion I may say by way of condensation, that if moneys are to be recovered by a city because of unauthorized expenditures under void contracts, the action must be taken before the contract becomes fully executed, else the case of the *State, ex rel.* vs. *Fronizer,* supra, will be encountered, which case precludes recovery except under the circumstances therein set out.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

616.

DISAPPROVAL—GRANT OF EASEMENT IN LAND IN ADAMS TOWNSHIP, DARKE COUNTY, OHIO.

COLUMBUS, OHIO, May 19, 1937.

HON. L. WOODDELL, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a certain grant of easement, No. 792, conveying to the State of Ohio, for the purposes therein stated, a certain tract of land in Adams Township, Darke County, Ohio.

Upon examination of the above instrument, it appears that the property is in the name of the Estate of R. C. Horner and is signed by F. B. Horner, Executor of said estate. However, there is nothing contained in the said instrument that there was authority for the execution of the same by the executor.

I am therefore returning this easement to you without my approval endorsed thereon.

Respectfully,
HERBERT S. DUFFY,
Attorney General.